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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 691

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

EDYTHE STERLING HAMMOND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION AS TO THE RECORD.

Filed February 1, 1943.

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GEORGE W. DALZELL,
Of Counsel.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Ogden H. Hammond, Jr., respectfully shows to this Honorable Court:

I.

Summary Statement of Matter Involved.

This case involves important questions of the status of the inferior courts of the District of Columbia and of the proper application of the law of New York by the District of Columbia courts in a separation agreement case. The

material facts herein are undisputed, and only questions of law arise on the record.

Petitioner and respondent, living in New York, were there married on June 7, 1933 (R. 88). The sole marital domicile was New York, and the only issue of the marriage was a daughter there born on March 22, 1936 (R. 88). Disagreements arose and a separation took place at the end of 1937 (R. 88). A separation agreement was entered into in New York as of January 1, 1938 (R. 88), and this separation agreement is set forth in full as the contract upon which this suit was instituted (R. 64-75). Respondent and petitioner were divorced at Reno, Nevada, on March 3, 1938 (R. 89), and the decree of divorce by reference incorporated the separation agreement (R. 76-77).

The separation agreement here in suit provides that for the year 1938 petitioner was to turn over to respondent the leased apartment in which they had lived at 950 Park Avenue, New York City, and 20% "of all income received by him during such period", and for the years thereafter to pay respondent 40% of petitioner's income if it did not exceed $7,500 (R. 66-67). When petitioner's income was more than $7,500, respondent was to receive 30% "but in no event less than Three Thousand Dollars ($3,000) nor more than Six Thousand Dollars ($6,000)" (R. 67).

The separation agreement also provided that respondent should have custody of the child during minority subject to complete right of visitation by petitioner, and also subject to petitioner's right "at his option (1) to have complete custody of the Child for two (2) months in each year at any time designated by him so long as the Wife has not remarried and the Child has not attained the age of eight (8) years * * *", the state of affairs prevailing now (R. 65). After the child has attained the age of eight years (March 22, 1944), petitioner and respondent are to share the custody of the child equally each

year (R. 65-66). Respondent was also to turn over to petitioner certain very valuable antique furniture listed in Schedule A to the separation agreement (R. 69-70, 72-75).

In May, 1941, the respondent instituted this action in the then Municipal Court of the District of Columbia to recover an alleged balance of $210.99 for the year 1939, and of $600 for the year 1940 under the separation agreement. There is some dispute about one item of $100 for the year 1940 (R. 63, 114, 121-122), but the figures are otherwise undisputed on all sides. Petitioner by way of defense set up that he had overpaid respondent the amount of $722.01 for the year 1938, which on accounting, together with the above item of $100, and certain other items (R. 99-100) later set out, amounted to an overpayment for the three years in question (1938, 1939, 1940).[1] Petitioner set up as a further defense that in no event was respondent entitled to recover because she had refused him the custody of the child and thus had breached the terms of the agreement under the governing

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[1] The balance of payments under the separation agreement for the three years 1938, 1939 and 1940 here in dispute stand admittedly as follows:

Calendar Year.	Due Plaintiff.	Paid to or on Account of Plaintiff.
1938	$1,677.99	$2,400.00
1939	2,610.99	2,400.00
1940	3,000.00	2,500.00
Overpayment to Plaintiff	11.02	
	$7,300.00	$7,300.00

Nevertheless, the judgment affirmed below admittedly gives respondent *a double recovery* in the amount of $810.99. Based on this double recovery, respondent has already instituted certain other litigation (*Hammond* v. *Hammond*, No. 13623) in the District Court of the United States for the District of Columbia against petitioner in an attempt to deprive him of all custody of his child and at the same time compel him to pay her a life annuity of $3,000 to $6,000 a year despite her refusal to fulfill her covenants. Petitioner enlisted in the Army on December 15, 1942, and the District Court litigation by court order was stayed for the duration of his military service on December 17, 1942.

law of New York, and also she had failed and refused to turn over the furniture to him. See R. 135-136.

At the trial before Judge Robert E. Mattingly in the Municipal Court without a jury on July 17, 1941, respondent proved only the agreement, the divorce and the payments made, *nothing else* (R. 20-29). The court then *assumed* that petitioner had violated the separation agreement by refusing to make certain sworn statements as to his income on the 10th of January each year (R. 31, 51-53). The court then went on to shift the burden of proof to petitioner, holding that it was his duty as defendant to show that he had committed no defaults under the separation agreement *before he could introduce any proof* (R. 54, 62, 52-53). *There is not a single word of proof to the effect that petitioner ever violated the agreement in the entire record, and it is not the fact.* On this *assumption,* the Municipal Court excluded all of petitioner's proof save only the oral conversations in which respondent had refused petitioner the custody of the child in 1941 *before this suit was instituted. This denial of custody to petitioner is undisputed* (R. 37, 39). The court excluded, however, documentary evidence in the form of letters between petitioner and respondent showing denial of custody (R. 82-88, 101-103, Excluded R. 46). Automatic exceptions were preserved to every adverse ruling of the Municipal Court (R. 43, 54).

Throughout the trial petitioner pressed upon the court offers of expert testimony on the law of New York which admittedly alone controlled this case, and these were always rejected by the trial court (R. 32, 47-48, 54). The theory on which these were rejected was that the Municipal Court of the District of Columbia was a "court of the United States" and as such entitled to take judicial notice of all laws prevailing in another State, and consequently that under the rule announced by this Court in *Fourth National Bank v. Franklin,* 120 U. S. 747, and the cases following

that decision, the admission of expert testimony on the law of New York was forbidden. To all of these rulings petitioner duly excepted (R. 32, 47-48, 54).

After having the case under advisement for some months, the Municipal Court, in September, 1941 without opinion handed down a general trial finding in respondent's favor but "without interest or costs" (R. 93). Certain special special findings submitted by petitioner were made (R. 88-89, 90), although most were refused, even though such refusal was contrary to the undisputed evidence in many instances (R. 88-93). A detailed motion for new trial was filed by petitioner (R. 94-106), and summarily denied (R. 93). In this motion for new trial petitioner set out that he had been denied a fair trial by reason of the exclusion of all his proof (R. 106). Final judgment was then entered for respondent in the amount of $810.99, without interest or costs (R. 107).

Petitioner was allowed an appeal by the United States Court of Appeals for the District of Columbia on February 3, 1942, by an order signed by Mr. Justice Stephens for a bench in the Court of Appeals differently constituted in membership than that which eventually heard the appeal (R. 18). The appeal was argued on October 14, 1942, in the Court of Appeals and on November 9, 1942, that court handed down its *per curiam* opinion (R. 113-115; 131 F. (2d) 351), affirming the judgment of the Municipal Court. Passing by all other questions without discussion, the Court of Appeals rested its affirmance on two grounds: First, that the 1938 overpayment could not be considered as an equitable set-off because it was a voluntary overpayment, made under a mistake of law; and, secondly, that petitioner could not set up respondent's refusal of custody as a defense despite the law of New York because he was in prior default under the agreement (a result reached only as a consequence of the court's decision upon the first ground).

Petitioner filed a full petition for rehearing[2] (R. 117-136) in the Court of Appeals, calling the attention of that Court in detail to the various errors of New York law and omissions contained in the opinion of the Court, and especially emphasizing his contention that the Municipal Court was not a "court of the United States" (R. 126-131). This was denied without opinion by the Court of Appeals on December 2, 1942 (R. 138).

II.

Jurisdiction.

Petitioner's timely-filed petition for rehearing was denied by the Court of Appeals on December 2, 1942 (R. 138). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

Questions Presented.

On the facts of this case, the following questions are presented:

(1) Is the Municipal Court of the District of Columbia a "court of the United States", so that under the applicable decisions of this Court the said Municipal Court knows *sua sponte* by judicial notice all the laws of all the States of the United States, and is consequently forbidden to take expert testimony as to the law of any State?

(2) Was the law of New York, admittedly the sole determinant of the rights of the parties in this case, properly applied by the courts below?

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[2] Record references in the rehearing petition are denoted as "App. p.—," but the page references are identical with those of the record here.

(3) Should petitioner's 1938 overpayment be set off against respondent's later claim for a double recovery?

(4) Does respondent's denial of custody to petitioner bar her recovery?

(5) On this record, should judgment for respondent (plaintiff below) herein be reversed?

IV.

Statutes Involved.

On the merits this case depends upon the common law of New York involving no statutes. On the important question of the status of the inferior courts of the District of Columbia, however, the following portions of the Code of 1940 of the District of Columbia are pertinent:

> "Section 11-101. The judicial power in the District shall be vested in—
>
> "First. Inferior courts, namely, municipal court, juvenile court of the District of Columbia, and the police court; and
>
> "Second. Superior courts, namely, the District Court of the United States for the District of Columbia, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States. (Mar. 3, 1901, 31 Stat. 1190, ch. 854, sec. 2; Mar. 19, 1906, 36 Stat. 73, ch. 960; Feb. 17, 1909, 35 Stat. 623, ch. 134; June 7, 1934, 48 Stat. 926, ch. 426; June 25, 1936, 49 Stat. 1921, ch. 804.)"
>
> "Section 11-305. The said court [that is, the District Court of the United States for the District of Columbia] shall possess the same powers and exercise the same jurisdiction as the District Courts of the United States, and shall be deemed a court of the United States.[3]

[3] No similar provision appears anywhere as to the Municipal Court or other inferior courts of the District of Columbia.

V.

Reasons for Granting the Writ.

1. The question of the status of the inferior courts of the District of Columbia is a generally important one and also involves certain statutory and constitutional questions which have not yet been, but should be, settled by this Court. The decision of this Court in *O'Donoghue* v. *United States*, 289 U. S. 516, determined that the superior courts (now the District Court of the United States for the District of Columbia and the United States Court of Appeals for the District of Columbia) were constitutional courts of the United States, but no precise decision defining the status of the inferior courts of the District of Columbia has been handed down by this Court, although it is believed that the pertinent decisions hereinafter referred to (*infra*, pp. 18-22) clearly point the way to a decision that the inferior courts of the District of Columbia are neither constitutional courts nor "courts of the United States" in any generally accepted sense. The increasing number of people in the District of Columbia, and the great volume of litigation in the Municipal Court making necessary an increase in the number of judges therein and a rearrangement of their functions by Congress (see Act of April 1, 1942), make it important to have a final decision on these points by this Court.

2. The United States Court of Appeals for the District of Columbia in its decision herein has not given proper effect to the applicable decisions of this Court which command that the law of New York should solely govern a determination of this case upon the merits, but, while paying lip-service to the law of New York, the Court of Appeals have in fact and substance completely circumvented that law by applying its own general philosophy of law. This

might be proper in a case governed in all respects by the law of the District of Columbia, but is erroneous in a case governed by the law of New York. All of this has been to the detriment of your petitioner. Among others, the applicable decisions which have not been given proper effect by the Court of Appeals in taking the above-stated action are: *Atherton* v. *Atherton*, 181 U. S. 155; *Williams* v. *North Carolina*, — U. S.—, decided by this Court December 21, 1942; *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Moore* v. *Illinois Central Ry. Co.*, 311 U. S. 643. Also the Court of Appeals denied effect to the applicable decision of this Court in *Walker* v. *Walker*, 9 Wall. (U. S.) 743, establishing the proper accounting procedure to be followed under a separation agreement.

3. The United States Court of Appeals for the District of Columbia, in affirming on this record the judgment against petitioner in the Municipal Court, in effect deprived petitioner of his property without due process of law, and so far sanctioned a departure from the accepted and usual course of judicial proceedings by the Municipal Court of the District of Columbia as to call for the exercise of this Court's power of supervision. If the Court of Appeals involved were one of the ten Circuit Courts of Appeal of the United States, this would unquestionably be reason for this Court's review and supervision, under Rule 38, Par. 5(b) of the Rules of this Court, and it is submitted by virtue of provisions of Section 11-101 of the Code of 1940 of the District of Columbia that this Court's power of supervision as the court of final resort in the District of Columbia should here likewise be invoked. Petitioner submits that on all the facts of this case he was denied a fair trial by the Municipal Court, and respectfully requests this Court to review the record herein to determine that question. See petition for rehearing (R. 117-136).

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court on the day certain to be therein specified, a full and complete transcript of the record and all proceedings had in said United States Court of Appeals for the District of Columbia in the case therein entitled "Ogden H. Hammond, Jr., Appellant, *v.* Edythe Sterling Hammond, Appellee, No. 8050", to the end that said case may be reviewed and determined by this Court, as provided by law, that the judgment of said court be reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem just and proper.

OGDEN H. HAMMOND, JR.,
By WILBER STAMMLER,
Counsel for Petitioner.

DANIEL G. ALBERT,
GEORGE W. DALZELL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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No.

OGDEN H. HAMMOND, JR.,

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vs.

EDYTHE STERLING HAMMOND,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

There was no opinion in the Municipal Court. The opinion of the Court of Appeals (R. 113-115) is reported in 131 F. (2d) 351. The jurisdiction of this Court, the statutes involved, the statement of the case, and all other preliminary matters have been set forth in the foregoing petition.

Summary of Argument.

POINT I.

The Municipal Court of the District of Columbia is an inferior tribunal and not in any accepted sense a "court of the United States", and hence expert testimony as to foreign law is required to be taken by the Municipal Court.

POINT II.

The Court of Appeals plainly misapplied the law of New York; under that law, judgment for the petitioner is required in the circumstances disclosed by the record.

POINT III.

Various other errors committed by the lower courts herein call for the exercise of the supervisory power of this Court in the circumstances of this case.

ARGUMENT.

POINT I.

The Municipal Court of the District of Columbia is an inferior tribunal and not in any accepted sense a "court of the United States" and hence expert testimony as to foreign law is required to be taken by the Municipal Court.

1. *The state of the record.*

Throughout the trial, petitioner constantly pressed upon the Municipal Court expert testimony as to the law of New York upon all the material points having to do with the separation agreement (R. 32, 47-48, 54). Exceptions were saved to the refusal of the Municipal Court to permit petitioner's expert testimony on the law of New York (R. 48, 54). This point was pressed again upon the motion for new trial (R. 94, Item 4). All parties and both courts below are unanimous in their agreement that this case is governed solely by the law of New York (R. 90, Finding 12; R. 114) ("under the New York law which governs this agreement").

This question was argued out both orally and in the briefs before the Municipal Court and admittedly under the authorities cited below the expert testimony had to be admitted in evidence unless the Municipal Court of the District of Columbia was a "court of the United States." The

Municipal Court ruled that it was such a court and hence excluded all expert testimony on the law of New York. This point was duly assigned as error in the Court of Appeals. On appeal to the Court of Appeals, both in the briefs for leave to appeal and in the argument on the merits after the Court of Appeals had allowed the appeal (R. 18), petitioner constantly pressed his argument that the Municipal Court of the District of Columbia was not a court of the United States in such a sense as to permit the exclusion of expert testimony as to foreign laws. This was fully argued orally before the Court of Appeals and nevertheless by its judgment (R. 116) the Court of Appeals affirmed all the rulings of the Municipal Court to the effect that said Municipal Court is a court of the United States and hence should exclude all expert testimony as to foreign law.

This point was not mentioned in the opinion of the Court of Appeals despite the argument devoted to it, but it was called squarely to the court's attention again in the petition for rehearing (R. 126-131) and the overruling without opinion of that petition (R. 138) necessarily again determined that the Municipal Court of the District of Columbia was a court of the United States and could not receive expert testimony as to the laws of any state in the United States. Hence, this record squarely presents this question for consideration by this Court upon this petition for a writ of certiorari. *Cf. Honeyman* v. *Hanan*, 300 U. S. 14. See R. 130.

2. *The admissibility of expert testimony as to foreign law.*

The rules here are simple because they have been many times expounded by this Court. In *Hanley* v. *Donoghue*, 116 U. S. 1, 4, this Court laid down the rule that in all cases *in State or local courts*, foreign law must be proved as a fact, saying:

> "No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. *Talbot* v. *Seeman*, 1 Cranch 1, 38; *Church* v. *Hubbart*, 2 Cranch 187, 236; *Strother* v. *Lucas*, 6 Pet. 763, 768; *Dainese* v. *Hale*, 91 U. S. 13, 20. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State."

This Court has many times since applied this same rule. *Huntington* v. *Attrill*, 146 U. S. 657, 678; *Lloyd* v. *Matthews*, 155 U. S. 222, 227; *Chicago R. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 623; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 371; *Allen* v. *Alleghany Co.*, 196 U. S. 458, 464. It is a rule which is said to be universal in application (See *Wigmore on Evidence* (3rd ed., 1940) Section 1953; Lord Brougham in the *Sussex Peerage* case, 11 C. L. & F. 115). It is a rule applied without dissent in the various State courts and no cases to the contrary are known. A representative collection of State cases is included in the footnote below.[4] It is to be noted that these State cases include a square ruling upon this point by the highest court of New York.

There is only one exception which has ever been recognized to the above rule. That was laid down by this Court in *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751,

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[4] *Hanna* v. *Lichtenheim*, 225 N. Y. 579, 582, 122 N. E. 627; *Harmon* v. *Peats Co.*, 216 N. Y. App. Div. 375, 214 N. Y. Suppl. 359. *Electro-Tint Co.* v. *Vatt Co.*, 130 N. Y. App. Div. 567, 115 N. Y. Supp. 38. *Saint Louis R. R. Co.* v. *Haist*, 71 Ark. 258, 72 S. W. 894. *Fish* v. *Smith*, 73 Conn. 377, 388, 47 Atlantic 715; *Miller* v. *Aldredge*, 202 Mass. 109, 88 N. E. 442; *Norman* v. *Penn. Fire Ins. Co.*, 237 Mo. 576, 582, 141 S. W. 619; *N. Y. Life Ins. Co.* v. *Orlapp*, 25 Tex. Civ. App. 288, 61 S. W. 339; *Sammis* v. *Whiteman*, 31 Fla. 10, 30, 12 So. 532; *Chattanooga R. R. Co.* v. *Jackson*, 86 Ga. 676, 681-682, 13 S. E. 108, 110; *Craven* v. *Bates*, 96 Ga. 78, 80, 23 S. E. 203.

and a line of cases following that decision in the lower Federal courts (*e. g., Andrus* v. *Peoples B. L. & S. Assn.*, 94 Fed. 575; *Crory, McFawn & Co.* v. *Hagarty, Conroy & Co., Inc.*, 27 F. Supp. 93, at 95, affirmed 109 Fed. (2nd) 443). This exception is that in "courts of the United States" the law of the several states of the union are not foreign laws which must be proved as facts but are laws of various harmonious units of the domestic whole which are taken judicial notice of by such courts. We think it is clear from the context of the rule as announced in the *Francklyn* case and the decisions in the various cases that have followed it that the rule is limited to *federal courts* of the United States acting in their federal capacity.

It is apparent that the reasoning behind this salutary rule is in no wise related to the municipal or other inferior courts of the District of Columbia. These are strictly local courts whose origin and history are discussed in the section next following. Their jurisdiction is limited solely to a *limited* number of suits involving a limited amount of money (formerly less than $1,000, now less than $3,000) against local residents of the District of Columbia.

Admittedly if this suit had been instituted in the Supreme Court of the State of New York, or in the Common Pleas Court of Ohio, or in the Superior Court of Connecticut, all State courts of unlimited original jurisdiction, the expert testimony here offered to the Municipal Court would have had to be admitted under the authorities cited above. Admittedly the testimony would not have had to be admitted in the same suit brought in a district court of the United States, sitting in one of these States under the rule announced in the *Francklyn* case. The question becomes a simple one: Is the Municipal Court of the District of Columbia, an inferior tribunal of severely limited jurisdiction, governed by the rules applicable to the various State courts of original unlimited jurisdiction, or by the rules pertain-

ing to the District Courts of the United States, sitting in their federal capacity? We believe the decisions of this Court clearly point out that the Municipal Court of the District of Columbia is to be governed by the same rules as applicable to all State courts and is therefore required to admit expert testimony as to foreign law.

We believe that no better exposition of the meaning of the phrase "courts of the United States," as applied in the above rule may be found than in *United States* v. *Mills*, 11 App. D. C. 500, 505, 506-507, holding the Police Court of the District of Columbia not to be a "court of the United States":

> "* * * While in the fourteenth section, that now under consideration, the express language used is 'any court of the United States'. Nor is there any good reason for the restriction of this expression to the so-called general system of the courts of the United States, assumed to be confined to the Federal courts in the several States of the Union. We must regard the Federal courts in the District of Columbia as being as much an integral part of the Federal judicial system as are the Federal courts in the States; for the jurisdiction of the Federal Government over the District of Columbia is as explicitly ordained by the Constitution as is any other grant of power to the Federal Union; and is inalienable."
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> * * * * * * *
>
> "But it does not necessarily follow from this that the expression—'any court of the United States'—used by Congress in Section 1042 of the Revised Statutes, was intended, or should be construed, to include such a tribunal as the Police Court of the District of Columbia. That court is undoubtedly in one sense a court of the United States, as is even the court of a justice of peace in this District, or a court martial, or any other tribunal established by Congress for temporary or special circumstances; and it does not make the Police Court any less a court of the United States to call it a legislative court; for the legislative power can

establish no court, either here or elsewhere, which is not authorized by the Constitution. But the fact that the Police Court is a court of the United States, created by the Congress of the United States under the authority of the Constitution of the United States, does not necessarily make applicable to it all laws enacted for courts of the United States.

"It is one of the settled rules for the construction of statutes; that general words in a statute may be restricted in order to give effect to the legislative purpose. See Potter's Dwarris on Statutes, p. 164; Sedgwick on Statutory and Constitutional Law, Ch. 6; *Reiche* v. *Smythe*, 13 Wall. 162. Now it requires no elaboration of argument or citation of authorities to show that when there is mention, either in the Constitution or in the statute law, of the courts of the United States, the courts thereby meant are those of general jurisdiction—not temporary, transitional, or sporadic courts; or courts of inferior and limited jurisdiction, specially organized to deal in a summary way with petty matters, either civil or criminal, outside of the usual course and scope of the common law. Of the latter character, undoubtedly, is the Police Court of the District of Columbia, although some common law jurisdiction has now been conferred upon it, and it has been authorized to proceed in divers cases in accordance with common law methods. Like the courts of the justices of the peace, which it was intended in criminal matters to supersede, its purpose was to take the place of the county courts or other courts of minor jurisdiction in England, which were never regarded as being within the general judicial system of that country, and the successors of which for the District of Columbia were certainly never contemplated by the framers of the Federal Constitution as coming within the scope of the provisions which they established for a Federal judicial system. The Police Court of the District of Columbia, therefore, although a court of the United States, is not a court of the United States in the sense of the Federal Constitution, and there is no reason for giving to the same expression in a statute

a broader meaning than is given to it in the Constitution. In fact, when there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason to be deduced from the context of the statute for giving to the expression a different meaning."

3. *The Origin and History of the Municipal Court of the District of Columbia.*

This Court has already fully considered the origin and early history of the Municipal Court of the District of Columbia in *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 15-18, 28 *et seq.,* 30-36, 41-43. The references in that case bring the history of the Municipal Court (then termed the Justice of the Peace Court of the District of Columbia) from its earliest English origins in the *courts leet* of the manor in feudal England through their adoption in this primitive form into Maryland, and thence by Act of Congress into the District of Columbia, when this District was created out of Maryland. In that case, this Court held that a trial by a jury of twelve before a Justice of the Peace (the same type of court that Judge Mattingly held in the instant case without a jury) *and* a review by another jury of the facts on appeal to the Supreme Court of the District of Columbia, as provided by Act of Congress, did not contravene that provision of the 7th Amendment of the Constitution of the United States prohibiting any review of facts once settled by a jury verdict "otherwise than according to the rules of the common law." The reason for this decision was based upon the ground that juries before justices of the peace were neither constitutional nor commonlaw juries. See 174 U. S. 1, at 17-18. This Court went on to say:

"Justices of the peace in the District of Columbia, in the exercise of the jurisdiction conferred upon them

by Congress to try and determine cases, criminal or civil, are doubtless, in some sense, judicial officers. *Wise* v. *Withers*, 3 Cranch 330, 336. *But they are not inferior courts of the United States, for the Constitution requires judges of all such courts to be appointed during good behavior.*[5] Nor are they, in any sense courts of record. They were never considered in Maryland as 'courts of law'. The statutes of Maryland of 1715, c. 12, and of 1763, c. 21 (in Bacon's Laws of Maryland), and of 1791, c. 68 (in 2 Kilty's Laws), defining the civil jurisdiction of justices of the peace, were entitled acts 'for the speedy recovery of small debts out of court.' And Congress has vested in them 'as individual magistrates', the powers and duties which justices of the peace previously had under the laws in force in the District of Columbia. Act of February 27, 1801, c. 15, Sec. 11; 2 Stat. 107; Rev. St. D. C., Sec. 995." (174 U. S., at 17-18.)

* * * * * * *

"A justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and defined by, and rested upon, the acts of Congress only." (174 U. S., at 38.).

It would be a work of superarrogation for counsel to attempt to trace the early history of these courts in the District of Columbia more fully than this Court has already done in *Capital Traction Company* v. *Hof*. The further history of these courts, after the decision of this Court in the *Hof* case, may be briefly traced. It is fully discussed by Mr. Justice Stephens in the United States Court of Appeals for the District of Columbia in *Schwartz* v. *Murphy*, 72 App. D. C. 103, 105 *et seq.*, 112 F. (2d) 24. There Mr.

[5] Emphasis ours throughout unless otherwise noted.

Justice Stephens (who granted leave to appeal in this case, presumably on this same issue, R. 18) pointed out that first there were justices of peace in Maryland which were brought over into the District of Columbia, and that the history then continued as outlined in the *Hof* case. Thereafter, in 1909, Congress (35 Stat. 623, Section 1) provided as follows: "The inferior court known as justices of the peace * * * shall remain as now constituted but shall hereafter be known as the Municipal Court of the District of Columbia." The same Act made this inferior tribunal a court of record. The jurisdictional amount of this Court was limited to $300 as at the time of the *Hof* case, and it was only by later legislation that it was raised to $1,000 which was the situation at the time the instant case was tried in the Municipal Court in July, 1941. Thereafter and on April 1, 1942 (Pub. L. 512, 77th Congress, Ch. 207, 2nd Sess.), the Congress changed and expanded the setup of the Municipal Court of the District of Columbia into its presently existing form, also providing for an intermediate appellate tribunal to be known as the Municipal Court of Appeals, between the Municipal Court and the United States Court of Appeals for the District of Columbia. In all of its provisions, the Congress was careful to specify only the limited additions it was making to the inferior tribunals, first in making it a court of record, secondly in increasing its jurisdictional amount from $300 to $1,000 and then to $3,000; and thirdly in expanding its personnel and making it a more efficient instrument of justice in the District of Columbia as shown by the Act of April 1, 1942, together with providing an intermediate appellate tribunal to review both interlocutory and final determinations of the Municipal Court. (Previously interlocutory determinations of the Municipal Court could not be reviewed by any tribunal. See *Serkowich* v. *Wardell*, 69 App. D. C. 389, 102 F. (2d) 253.)

It is of the utmost significance that Congress has never provided for life tenure of judges in the Municipal Court in the District of Columbia, but on the contrary has limited their appointments to a term of years only, and also that Congress has seen fit to omit the legislative declaration that these inferior tribunals are courts of the United States, which it has especially made in the case of the District Court and the Court of Appeals for the District of Columbia. (Supra, p. 7.)

Prior holdings of the Court of Appeals for the District of Columbia show that earlier that court also understood the Municipal Court of the District of Columbia *not* to be a court of the United States. Thus, in *W. B. Moses & Son* v. *Hayes*, 36 App. D. C. 194, the court held the Municipal Court of the District of Columbia to be an inferior court and as such it "is a part of the judicial system of the district" (36 App. D. C. at 198). See also *United States* v. *Mills, supra*, pp. 16-18.

The Court of Appeals has previously so held with regard to the Police Court and the Juvenile Court of the District of Columbia, the Police Court having once been one of the branches of the Justice of the Peace Court, then established as a separate court and now again merged into the Justice of the Peace Court which has become the Municipal Court for the District of Columbia by the Act of April 1, 1942. *Cf. Tipp* v. *District of Columbia*, 69 App. D. C. 400, 102 F. (2d) 264, citing and relying on *United States* v. *Mills, supra.*

In *United States* v. *West*, 34 App. D. C. 1, the Juvenile Court of the District of Columbia was held to be "a subordinate inferior tribunal" (34 App. D. C. at 17) and "an inferior court of special, limited jurisdiction". (34 App. D. C. at 18). In that case, the Court of Appeals further said: "the supreme court of the District of Columbia has general common-law jurisdiction of civil and criminal matters * * * There is only one general court of common-

law jurisdiction within the District of Columbia, which is the supreme Court." (34 App. D. C. at 16.) See also *Fidelity Deposit Co.* v. *McQuade*, — App. D. C. —, 123 F. (2d) 337, 339.

Summing up, we believe that the District of Columbia is a locality distinct to itself and has characteristics similar to those of any State of the Union. Certainly, this is true in other than its judicial aspects. See *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 4 *et seq.*, where this Court has said that the Government of the District of Columbia is "strictly municipal in its character", and later, that "the Government of the United States * * * took no part in the local government." Indeed, this Court went on to say that the District of Columbia may be considered a separate State in a limited sense. See 132 U. S. 1, at 9. We believe that these considerations likewise apply to the inferior judicial tribunals of the District of Columbia which are local courts just as much as any State court is. Only the Federal Courts in the District of Columbia are federal in their character, and hence "courts of the United States" in the sense in which we have been discussing these courts. This view is reinforced by the authority of many decisions of this Court. See *O'Donoghue* v. *United States*, 289 U. S. 516, 545 *et seq.*; *Williams* v. *United States*, 289 U. S. 553. Compare *McAllister* v. *United States*, 141 U. S. 174, 180 *et seq.*, where this Court held that a judge of the Alaska Territorial court could be removed from office by the President and spoke accurately of such a judge as "a judge of a court of record created by the United States" (141 U. S. at 193), but not as a judge of a court of the United States. This we believe to be the case with the Municipal Court of the District of Columbia, and we feel that in view of the dubiety apparent on the matter, this Court should grant certiorari and so declare the law.

4. *The meaning of words as interpreted by the law of New York*

In addition to the foregoing, petitioner wishes to prove custom in New York as to separation agreements, and *the meaning of the words* contained in the agreement here sued upon. This is clearly admissible testimony under all the authorities. See *Harrison* v. *Nixon*, 9 Peters (U. S.) 483, 504, per Mr. Justice Story; Story on Conflict of Laws (8th Ed., 1883), pp. 651-652; Restatement of the Conflict of Laws, §214; and authorities and argument collated in the petition for rehearing (R. 130-131). Therefore, it was plain error to exclude expert testimony upon this point, and a verdict based upon this ruling should not be sustained.

The Court of Appeals has held that where there is no proof of the foreign law "the presumption must be indulged either that the rule of the common law or that in force in the District of Columbia prevails". *Howard* v. *Railway Company*, 11 App. D. C. 300, 337. As may be seen from a comparison of the decision of the Court of Appeals in the instant case (R. 113-115) with the decision of the Court of Appeals of New York in the two *Haskell* cases (see Appendix), this is not the case. Hence, in view of further impending litigation in collateral suits in the District Court in this matter, petitioner should be rescued from the false position in which the present decision of the Court of Appeals has placed him.

Point II.

The Court of Appeals plainly misapplied the law of New York; under that law judgment for the petitioner is required in the circumstances disclosed by the record.

The Court of Appeals in its opinion correctly stated that "by the law of New York the custody provision is a material part of the contract, and a breach by the wife without justification will bar recovery by her. *Duryea* v. *Bliven*,

122 New York 567, 25 N. E. 908" (R. 114). However, the Court of Appeals in its ruling and decision then goes on to ignore the remainder of the law of New York on this point. It is to be emphasized that there have been many thousands of decisions upon similar separation agreements in New York, and for that reason particularly petitioner desired to introduce expert testimony in order to show what the law of New York really was.

Before going further with the argument on the law of New York, it may be well to point out the state of the record upon this item. The separation agreement clearly provides that the father is to have the complete custody of the child for two months in each year "at any time designated by him" so long as the mother has not remarried and the child is not eight years old, which is here the case (R. 65). The undisputed evidence which no court has the right to ignore shows that respondent has refused to comply with those custodial provisions. The record shows that respondent has not only refused to turn over the child to petitioner but on March 9, 1941 she explicitly refused a formal oral demand by petitioner's attorney (expressly authorized by petitioner to make this demand) for custody of the child during two months in the summer of 1941 (R. 37). The witness Stammler testified in detail as to what took place in that interview between himself as petitioner's attorney on the one hand, and respondent and her attorney, Mr. Walsh, on the other, (R. 35-36), and although both Mr. Walsh and respondent were present at the trial and both heard part of Stammler's testimony and respondent all of it, *neither took the stand to contradict him as they certainly would have had they disputed his testimony in any particular.*

This refusal to surrender custody of the child is made perfectly clear in the record. As Stammler testified, "The reply to this was the statement by Mrs. Hammond * * *

that in no event would she agree to surrender custody of the child outright to her former husband" (R. 37). Further questioning of Stammler by the Court below brings this point out sharply. The following colloquy later occurs (R. 39):

> "The Court: She refused to let him have the child?
> "The Witness: She did.
> "The Court: That is all I want to know."

There is a great amount of correspondence between Walsh and Stammler both before and after March 9, 1941, showing this consistent refusal to turn over custody of the child on respondent's part. All of this was excluded by the Court below (R. 38-39), but the gist of its contents is clearly brought out in the motion for a new trial denied by the Court below (R. 97-99). If any doubt remained that respondent refused to turn over custody of the child to petitioner it was removed by her letter of August 15, 1941 (R. 101-103) which said *inter alia*: "In any event I want you to know that from the facts which have come to my attention, I would not feel justified as a mother in allowing you complete custody of the child for two months. I shall be glad, however, to allow you to visit Edythe whenever you desire." To this petitioner made reply on August 22, 1941 (R. 103-106), again demanding his full custodial rights.

The Court below ruled that all of this testimony was immaterial. Upon having his attention directed to petitioner's refusal to turn over custody of the child *long before the institution of this action,* the Court remarked:

> "All right. I do not think it is very material" (R. 47).

Proceeding under the separation agreement and treating it as still valid and in effect and seeking to base a recovery and judgment thereon, respondent was not and is not at liberty to disregard her own covenants and obligations

thereunder. The law of New York is perfectly clear upon this point, and the law of New York alone governs here. Respondent admits that the law of New York alone controls (R. 32), and there is a special finding of fact to that effect (R. 90), and the decisions of this Court command application solely of the law of New York (*Atherton* v. *Atherton*, 181 U. S. 155; *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 641; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Moore* v. *Ill. C. R. Co.*, 311 U. S. 643). See also *Shaw* v. *Saxman*, 46 App. D. C. 526, 532.

The pronouncements of the New York Court of Appeals have been clear and uniform on this subject: the refusal of the wife or ex-wife to give over custody of the child as provided in a separation agreement is an absolute bar to her recovery of *any payments under the agreement or otherwise.*

In *Dureyea* v. *Bliven*, 122 N. Y. 567, 25 N. E. 908, the Court of Appeals denied recovery to a wife on this ground saying, "The agreement of the wife * * * to permit the husband to associate with his children was not only valid but was a material part of the contract, which could not be violated by the wife, and a recovery be sustained in her favor, for her benefit, for the sum which he stipulated to pay monthly."

Again in *Haskell* v. *Haskell*, 201 App. Div. 414, 194 N. Y. S. 28, affirmed without opinion, 236 N. Y. 635, 142 N. E. 314, recovery was denied a wife suing under a separation agreement where in violation of the terms of the agreement: "The undisputed evidence is that * * * he was not willing to consent to his leaving her and going to the father" (201 App. Div. at 416). After full discussion the wife was denied *any* recovery because of her violation of the covenant in the agreement "where she had agreed with her husband that he was to have sole charge of the

education of their son, and where he asked for the custody of the child and the right to enjoy his society and discipline him and where he was willing and able to contribute for his support'' (201 App. Div. at 417-418). On appeal this was affirmed by the Court of Appeals.

On later action in the same case *for back sums under the separation agreement* the appellate court again reversed judgment for the wife, saying: ''the question (is) whether under the circumstances the defendant was obliged to pay the plaintiff anything * * * the action of the present plaintiff in harboring the boy when she knew he had refused to attend the school selected by the father was a violation of the terms of the separation agreement between the parties, and, therefore, the defendant was held not to be indebted to the plaintiff, and the complaint was dismissed'' (207 App. Div. at 724). Despite a vigorous dissent this judgment was unanimously affirmed without opinion by the Court of Appeals. The full citation of the controlling second *Haskell* case is 207 App. Div. 723, 202 N. Y. S. 881, affirmed unanimously and without opinion 254 N. Y. 569, 173 N. E. 870.

The *Haskell* cases under the rules laid down by this Court plainly control the decision of the instant case. *Erie Railroad Company* v. *Tompkins, supra.* The facts and law of these cases are examined in detail in the Appendix to this brief, where appropriate portions of the records therein are set out to show that the conclusions that the Court of Appeals in the instant case purported to draw as to the law of New York are false in every particular. See petition for rehearing (R. 124). For reasons that are immaterial the Court of Appeals did not see fit to follow the law of New York as laid down in the *Haskell* cases and we respectfully submit that this Court, applying its rules as announced in recent cases, should compel that court to follow the clear law of New York. We feel that a perusal of the Appendix

will leave no doubt but that every one of the concluding remarks of the Court of Appeals in this case (R. 115) are directly contrary to the law of New York. That law clearly points out that whether the demand for custody of the child is made before or after the husband is in default, a refusal to comply with custodial demand excuses the husband from further payments under the separation agreement.

Surrogate Foley of New York County (a well known authority on New York law) only last year disposed of a claim identical with appellee's here, denying the ex-wife plaintiff there recovery because of her refusal to permit her former husband to visit his daughter, saying: "the wife, by her refusal both before *and after* the pendency of the habeas corpus proceeding, breached the separation agreement in a material and important phase and thereby the husband was relieved of his obligation to pay the monthly installments."

"A parallel case directly in point was considered by the Court of Appeals in *Dureyea* v. *Bliven* (122 N. Y. 567)" (173 Misc. at 845). The learned Surrogate goes on to quote at length from *Dureyea* v. *Bliven* and to apply it, finally saying:

"The rules of law and the conclusions of the Court of Appeals in *Dureyea* v. *Bliven* (*supra*) that the denial of visitation relieved the husband of the duty to support under an agreement or a decree awarding alimony with *conditions* for the right of visitation, have been followed in subsequent authorities. (*Silkworth* v. *Silkworth*, 255 App. Div. 226; *Ambrose* v. *Kraus*, 256 App. Div. 933; *Swanton* v. *Curley*, 273 N. Y. 325; *Harris* v. *Harris*, 197 App. Div. 646" (173 Misc. at 848). *Matter of Noel*, 173 Misc. 844, 19 *N. Y. S.* (2nd) 370, per Surrogate Foley.

See also *Clayburgh* v. *Clayburgh*, 261 N. Y. 464, 185 N. E. 701; *Muth* v. *Wuest*, 76 App. Div. 322, 78 N. Y. S. 431; *Harris* v. *Harris*, 197 App. Div. 646, 189 N. Y. S. 215.

Furthermore, the law of New York in this particular—that is, holding that a denial of custody by the former wife relieves the former husband of any duty to continue separation agreement payments *whenever* such refusal by the former wife may take place—is in complete accord with the generally prevailing law of the United States on this point. The leading cases, in addition to the New York cases cited just above, are:

Heinsohn v. *Chandler*, 2 Atl. (2nd) 120 (Del. Ch. 1935);
Barnaby v. *Barnaby*, 290 Mich. 335, 287 N. W. 535;
Myers v. *Myers*, 143 Mich. 32, 106 N. W. 402;
Myers v. *Myers*, 161 Mich. 487, 126 N. W. 841;
Cole v. *Addison*, 153 Or. 688, 58 P. (2nd) 1013;
Stratton v. *Stratton*, 67 S. D. 354, 293 N. W. 183 (1940).

See Annotation 105 A. L. R. 901 *et seq.*

As the Oregon Supreme Court well summed up the situation in *Cole* v. *Addison*, *supra*:

> "In other words, he performed, and, when it became her duty to perform, she refused, and this excused him from any further performance upon his part." (153 Or. at 692-693.)

The facts of the instant case cause the remarks of the Supreme Court of South Dakota in *Stratton* v. *Stratton*, *supra*, to become particularly applicable here:

> "The agreement of the parties was that respondent was to pay appellant certain sums of money as alimony and in consideration therefor appellant was to permit respondent to occasionally enjoy the society of his little child. This she steadfastly refused to do and for no reason in the world except pure malice.
>
> "Appellant is not in court with clean hands and the court will leave her where it finds her. The Supreme Court of Minnesota recently reached the same result in a similar case. *Anderson* v. *Anderson*, Minn., 291 N. W. 508." (293 N. W., at 184-185.)

For further discussion, see petition for rehearing (R. 122-126).

POINT III.

Various other errors committed by the lower courts herein call for the exercise of the supervisory power of this Court in the circumstances of this case.

Respondent rested her case at the end of the first 10 pages of the transcript (Tr. 17-27; R. 20-29), having put on merely formal proof of the agreement and the payments and having discussed the one disputed item of one $100.00 payment already mentioned in the statement of the case. No word whatever was put in by respondent with reference to any breach of the separation agreement by petitioner. No claim has ever been made that he was late in any payment to respondent. Later in the case (R. 31) counsel for respondent contended that petitioner breached the contract but never put on any witness to prove it and never proved it by cross examination. The *verbatim* transcript (Tr. 17-74; R. 20-62) may be read from end to end, as indeed it has been carefully read by us, and not one word will be found from any witness and, in fact, from no one except claims made by Mr. Schein, respondent's counsel, *not testifying*, that petitioner had defaulted under the contract by not furnishing sworn income statements by the 10th of January in each year. As a matter of fact, petitioner had furnished respondent with certified copies of his income tax reports for the years 1938, 1939 and 1940, and these were actually used by respondent's counsel as the source of the income figures in the complaint. This was done *by a written arrangement* between the two attorneys, Walsh for respondent, and Stammler for petitioner (R. 97-98), all excluded by the lower court.

However, the persistence of Mr. Schein eventually wore down the Municipal Court because apparently that Court

was under the erroneous impression that proof had been made of appellant's default. See R. 51-52, where the Municipal Court said, "I am holding he has no such right under the agreement (*i. e.*, to prove the 1938 payment to appellee) *because he didn't furnish plaintiff with a statement of his income.*" This is an unwarranted assumption for which there is no word of proof in the record. Further the Court went on to shift the burden of proof to appellant ruling it was his duty to show that he had committed no defaults under the agreement (R. 54, 62, 52-53). This is a novel departure in the law of contracts, for which no warrant can be found in the books. All these rulings were affirmed by the Court of Appeals.

There were no defaults by petitioner. It is elementary and well settled law that every man is presumed to live up to his agreements until the contrary is proved. It was obviously a part of respondent's affirmative case to prove petitioner's defaults here if any there were, if his proof is to be barred. *Since none were proved none may be assumed by the Court, and it is clearly reversible error for the Courts below to base a final judgment on an unproved assumption as to petitioner's default and then exclude petitioner's entire case.* But Judge MATTINGLY ruled (R. 52-53): "All you are permitted to prove is that he complied with this provision of the agreement and furnished the plaintiff with statements of his income between certain dates."

The facts concerning the overpayment by petitioner to respondent of Seven Hundred Twenty-two and 01/100 Dollars ($722.01) in the year 1938 are set forth in detail in Defendant's Exhibit 2 for Identification (R. 79-81), excluded by the Court below (R. 42-43), which clearly shows the mathematical computations upon which this figure was reached, and also shows in detail all the payments made for all years through 1940, and their full computation. The

only additional facts not there mentioned is that these 1938 over-payments to respondent were made *at her own request* in petitioner's absence and *without his knowledge or consent* (R. 54-55, 99, Item VIII)—all of these facts were likewise excluded by the Municipal Court. This balance was set forth in the affidavit of defense (R. 14) and has never been denied by anyone at any point. No replication was filed, as should have been done if respondent disputed these figures, and these payments hence stand admitted by the pleadings. That this setoff should be allowed is clearly demonstrated by the course of accounting under a separation agreement similar to the one here in suit, approved by this Court in *Walker* v. *Walker*, 9 Wall (U. S.) 743.

The Court of Appeals in its opinion denied none of these facts, but chose to rest its affirmance upon another assumption (and an equally vicious one) to the effect that these payments were made under a mistake of law. This is a demonstrable mathematical error under Defts. Exhibit 6, for identification. Even worse, the Court of Appeals' opinion is based on consideration by that Court of evidence excluded below and considered above solely to affirm judgment against petitioner. *It is clear that the over-payment here was made, not under a mistake of law, but solely under a mistake of fact.* The argument on this point is fully set forth in the petition for rehearing (R. 119-121).

In all earnestness we can conceive of no greater injustice than has been perpetrated by the courts below in basing a final judgment permitting a double recovery by respondent of money admittedly already paid her *on an unproved assumption.* We respectfully submit to this Court, both as a matter of simple justice to the parties involved and as a matter of public concern in having a fair trial in future cases in the Municipal Court, or in any other tribunal of the District of Columbia, that this course of accounting

even in small sums of money should not be condoned or sanctioned.

There are other errors in the conduct of the trial below which have been fully assigned, but limitations of space prevent our consideration of these in this petition. Many of them are considered or touched upon in the petition for rehearing (R. 117-136), and we respectfully request the careful consideration of that petition by this Court. That petition likewise examines point by point the opinion of the Court of Appeals and shows its errors and omissions. Especially is it noteworthy that respondent has secured this judgment below in her favor *for a double recovery* in the instant case and a prejudgment in the future case in the District Court, while holding on to valuable furniture (petitioner's property) worth many times the amount of this judgment (R. 135-136), all contrary to the specific terms of the separation agreement. Final judgment for respondent herein would be a most remarkable act of injustice.

Conclusion.

WHEREFORE, we respectfully pray that the petition for a writ of certiorari herein be granted.

Respectfully submitted,

WILBER STAMMLER,
Attorney for Petitioner.

DANIEL G. ALBERT,
GEORGE W. DALZELL,
Of Counsel.

APPENDIX.

HASKELL v. HASKELL, TWO CASES:
(1) 201 App. Div. 414, 194 N. Y. S. 28; affirmed without opinion, 236 N. Y. 635, 142 N. E. 314;
(2) 207 App. Div. 723, 202 N. Y. S. 881, affirmed without opinion, 254 N. Y. 569, v73 N. E. 870.

In the two *Haskell* cases the situation briefly was that plaintiff wife and defendant husband were married in 1900. A son, the only child of the marriage, was born in 1902 and plaintiff and defendant continued to live together until 1916. At that time they separated and a separation agreement was entered into between them. *No divorce ever occurred throughout the period of the entire litigation.* Under the separation agreement defendant agreed to pay plaintiff $250 per month, provided that in the event of a violation by the wife of her covenants the sum should be reduced to $75 per month. All the above facts and the ensuing litigations occurred in the State of New York.

Reference has already been made to these two cases in the body of the brief, *supra*, pp. 26-28. Since both affirmances were without opinion by the Court of Appeals of New York and since the opinions of the Appellate Division are unsatisfactory, it has seemed advisable to resort to the briefs and records in the two cases to see what was determined by the Court of Appeals. This procedure in determining the law of New York on a given point has the sanction of the Court of Appeals of that State. See *Title Guarantee and Trust Co.* v. *Mortgage Commission*, 273 N. Y. 415, at 425; 7 N. E. (2d) 841, at 845, where the case of *Perillo* v. *Zunino* (259 N. Y. 21, 180 N. E. 882) was so treated and considered by the New York Court of Appeals. Whatever may be the merits of deciding important issues of law without opinion—*Cf. Honeyman* v. *Hanan*, 300 U. S. 14; but *cf.* the opinion (R. 113-115) in the instant case which ignores many of the controlling issues of law presented here (R. 126-136)—there is no doubt but that the *Haskell* cases decisively determined the law of New York upon these points and were intended to do so. The greatest judges of New York sat in these cases and participated in

the judgments, including Mr. Justice CARDOZO, later of this Court. Certainly their decision upon what the law of New York *is* should not be ignored by the Court of Appeals.

We turn now to the record and briefs in the two *Haskell* cases. Copies of these records and briefs are available in New York City at the courthouse of the Appellate Division, First Department, at the Association of the Bar of the City of New York, and at the New York County Lawyers' Association, and of course at the New York Court of Appeals in Albany, New York. All facts and page references hereinafter stated are supported by photostatic copies of the pages in question which, if requested, we shall be glad to make available to the Court. We now refer to the facts of the first *Haskell* case.

The defendant husband did not pay to plaintiff wife the sum of $250 for the month of May 1917. Suit was instituted by plaintiff, judgment was recovered by her and that judgment was paid. Defendant did not pay any sum for the months of June and July 1917, and another suit was brought for these months, judgment recovered and appeal taken to the Appellate Term; the judgment was affirmed and this judgment was paid.

A third suit was started for payments subsequent to July 1917, which amounts were paid after the affirmance by the Appellate Term in 1918 of the judgments for the months of June and July 1917 and after the commencement of subsequent litigation.

The first *Haskell* case was then instituted by the service of a summons and complaint out of the Supreme Court on the defendant on January 14, 1919, *while the prior litigation* was still pending (1st *Haskell* record, p. 1). This first *Haskell* suit was for necessaries for the period from August 1, 1918 onward. Defendant's Exhibits 1, 2 and 3 (letters of demand between husband and wife) to this action were written while the prior litigation was pending.

The important fact here, of course, is that the letters of demand (Defendant's Exhibits 1, 2 and 3) for custody of the child of the parties *were written by the husband during litigation and while outstanding judgments secured by the wife against him were unpaid.* Despite these facts the wife was held unjustified in her denial of custody to the

husband, and was held to have cut off her right to support *under the agreement* by such refusal. *This* is the rule of New York law announced twice by the highest court of that State. *This* is flatly the converse of the rule announced by the Court of Appeals in the instant case that "the obligations of appellant and appellee under the agreement were mutual and reciprocal. Hence, while appellant's breach continued, he was in no position to demand performance by appellee" (R. 115). No New York authority is or can be cited for this proposition, as the law of New York is squarely to the contrary, as stated above. It was gross error for the Court of Appeals herein to ignore the law of the *Haskell* cases.

In the examination of plaintiff wife in the first *Haskell* case the following facts are shown at pp. 62-63 of the record:

"Q. Under the separation agreement, about which you have been asked, you get $250.00 a month from Mr. Haskell for your maintenance and support, do you not? A. Yes, sir.

Q. In May, 1917, did Mr. Haskell send you $250.00? A. He did not.

Q. And what did you do? A. I started a suit for the money.

Q. And did you receive $250.00 for the months of June and July, 1917, from Mr. Haskell? A. I did not.

Q. Well, what followed that? A. Then I brought another suit.

Q. In September, 1917, at the time that these letters, Defendant's Exhibits 1, 2 and 3, were written, was litigation pending between you and Mr. Haskell? A. Yes, sir."

At pages 83, 84, 85 and 86 of the first *Haskell* record appear these letters of demand, (Defendant's Exhibits 1, 2 and 3) as follows:

"

Defendant's Exhibit 1.

Copy of this letter sent to Arthur M. King and Ellenbogen & Selig.

September 6, 1917.

Mrs. Minna G. Haskell,
645 Madison Avenue,
New York, N. Y.

My dear Minna:

Phillips Academy, Andover, Massachusetts, will open for its fall term on the 18th inst. and it will be necessary for Will to leave New York for school with me on the 17th inst. It will also be necessary for him to come here to my office to see me on the 10th inst, at noon in order that I may procure for him any clothes which he needs to take with him.

I have written him that I shall expect to see him here on the 10th inst. and I wish you to know that I have so written him. It is quite necessary that he should be here at that time.

Very truly yours,

WM. S. HASKELL.

WSH:FM.
Registered.

Defendant's Exhibit 2.

September 11th, 1917.

Mrs. Minna G. Haskell,
645 Madison Avenue,
New York City.

My dear Minna:

I am enclosing a copy of a letter which I have today written to Will and I confidently expect that you will send him to me and see to it that he returns to school at Andover on the 17th inst.

Very truly yours,

WM. S. HASKELL.

Enc.
WSH/EL.

Defendant's Exhibit 2a.

September 11th, 1917.

Master William H. Haskell,
645 Madison Avenue,
New York City.

My dear Will:

Your letter of September 7th, last, was received by me yesterday. I note that you refuse to return to Andover. By so doing you are not only injuring yourself, by failing to get a good education, but you are also harming the very person whom you claim that you wish to assist, *i. e.*, your mother. I will not pay for your support unless you follow my instructions and I now again direct that you go to Andover on the 17th inst., and take up and continue your work there for the school year. It will be necessary, if you persist in your refusal, for you either to earn your own living or become a burden upon your mother.

I ask you to come to my office at noon on Thursday next, September 13th, 1917.

With much love,

FATHER.

WSH/EL.

Defendant's Exhibit 3.

Sept. 12/17.
645 Mad Ave.

William S. Haskell.

Sir:

I wish to inform you in answer to yours of the 11th, that I have had nothing whatever to do with Will's decision in regard to Andover.

I have urged him repeatedly to go, but he insists he would not do so, leaving me in the condition I am, but that he will willingly go as soon as you do what is right.

I do not choose to answer any more communications from you, and I think you know my attorney's address.

Yours truly,

MINNA GANS HASKELL."

On this record, judgment was entered by the Court of Appeals for defendant husband.

The second *Haskell* case was brought in the Municipal Court of the City of New York to recover monthly instalments in the sum of $250 each for the months of June, July, August and September, 1922. The issues in the second *Haskell* case put up to the Court of Appeals cannot be better stated than as they are stated by the wife's brief in the Court of Appeals, at pages 2 and 3 thereof, as follows:

The Present Action.

"The present action was brought in the Municipal Court on a separation agreement between the parties hereto to recover the sum of $1,000 consisting of four monthly installments of $250 each, which became due and payable to the appellant from the respondent on the 1st days of June, July, August and September, 1922, pursuant to paragraph five of said agreement (34-42).

The respondent's answer denied certain allegations of the complaint and set forth three separate and distinct defenses (46-60). Only the second and third defenses are material on this appeal.

The second defense is that the appellant failed to perform the agreements on her part to be performed (1) in that she brought an action against the respondent other than an action to enforce the provisions of said agreement (52), (2) in that she interfered with the education of the son of the parties, and with respondent's right to the sole direction of his support and maintenance, (3) in that she harbored said son in her residence without respondent's consent from and after September 19, 1917, until the summer of 1921, (4) in that appellant upheld said son in his disobedience to respondent, (5) in that respondent was not willing to consent and did not consent to said son leaving her during said times, and going to appellant, and (6) in that during said times she has refused to yield up the right of said son's education and custody for any portion of the time to appellant (52-54).

It will be seen that the breaches (2-6) are substantially similar. Our analysis of the appellant's obligations under the separation agreement shows that these breaches are all of no covenant which we have designated (1, 19).

The third separate defense pleads the prior suit as *res adjudicata* of the appellant's breach of the separation agreement (55-60).

It is important for the court to bear in mind that the order of reversal of the Appellate Division in the prior suit was subsequently resettled. The original order of the Appellate Division will be found at folio 895, and the resettled order will be found at folio 907.

At the conclusion of the appellant's case, no motion was made to dismiss the complaint (14). At the conclusion of the entire case, the respondent moved to dismiss on the ground "that the plaintiff has breached the contract of separation which is the basis of this suit" (456). Thereafter judgment for $1,087.42 was rendered in the appellant's favor (127-129). The Appellate Term affirmed said judgment with leave to appeal to the Appellate Division (13-15). The Appellate Division reversed the determination of the Appellate Term, and the judgment of the Municipal Court, two of the justices dissenting (1171-1173) and thereupon judgments were entered in the Supreme Court (1181-1187) and in the Municipal Court (1174-1180) dismissing the complaint on the merits (1186; 1180). Thereafter the Appellate Division granted a motion for leave to appeal to this court and certified "that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals" (1168).

The opinion of the Appellate Division will be found at folio 1192, and the dissenting opinion at folio 1198. There was no opinion by the Appellate Term or the Municipal Court."

Pages 4-7 of that brief following the ones above quoted are devoted to the issues of the first *Haskell* suit, which have already been stated *supra* pp. 36-38 and need not be copied here.

It is to be noted that in the second *Haskell* suit the testimony of the defendant husband, at pp. 85, 86, 87 and 88, bears out in every particular Mrs. Haskell's testimony quoted *supra*, p. 3, to the effect that the prior litigation between Haskell and his wife (in which definite and final judgments went against Haskell, which he had to pay) was still going on at the time of the demands in September 1917,

and even at the time that the first *Haskell* suit was commenced. This would seem to be a conclusive answer to the opinion of the Court of Appeals in the instant case. Whatever else the above quoted portion of that opinion may be (R. 115), *it is certainly not the law of New York.*

This fact is further brought out in the findings of fact in the decision of the first *Haskell* suit, which appear at pp. 210 and 211 of the record in the second *Haskell* case. There the 20th, 21st, 22nd and 23rd findings of fact read as follows:

"Twentieth: That the defendant did not pay to plaintiff the sum of Two hundred fifty (250) dollars during the months of May, June and July of 1917, as required by the separation agreement between the parties hereto.

Twenty-first: That thereafter two actions were brought against defendant for these sums.

Twenty-second: That in the first action, plaintiff obtained a judgment on June 29th, 1917.

Twenty-third: That in the second action, plaintiff obtained a judgment on October 4th, 1917, which was affirmed on appeal to the Appellate Term on January 2nd, 1918."

The order of reversal of the Appellate Division later affirmed by the Court of Appeals in the first *Haskell* case *did not reverse these particular findings,* as appears from page 300 of the record in the second *Haskell* case, which recites that these are left unaffected by the order of reversal.

On this record of the two *Haskell* cases there would seem to be no doubt but that the opinion of the Court of Appeals in the instant case is erroneous in the last three paragraphs in that it does not reflect the law of New York. We believe that this Court should issue a writ of certiorari to correct this deviation from the law of New York which this Court has said controls the rights of the parties hereto. *Atherton* v. *Atherton, supra; Erie* v. *Tompkins, supra.* We regret the length to which this Appendix has been carried, but in view of the exclusion of this and all other similar evidence herein we knew of no other way of actually placing before this Court the law of New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

OGDEN H. HAMMOND, JR.,

Petitioner,

v.

EDYTHE STERLING HAMMOND,

Respondent.

MOTION AS TO RECORD.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes your petitioner, Ogden H. Hammond, Jr., and respectfully moves the Court that, for consideration of the petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, the complete record in this case be not printed, and that the said petition for a writ of certiorari herein be considered by this Honorable Court upon the Appendix to Appellant's brief filed in the said United States Court of Appeals for the District of Columbia and upon all the proceedings had in the said United States Court of Appeals for the District of Columbia.

Your petitioner informs this Honorable Court that despite numerous oral and written efforts, respondent, without advancing any reason whatever except a desire to dis-

courage petitioner in making the foregoing application for a writ of certiorari herein, flatly refuses to stipulate that the foregoing petition for a writ of certiorari may be heard upon the Appendix to the Appellant's brief in the Court of Appeals. This was the only Appendix to either brief below, and due and ample notice was given of the printing of such Appendix (R. 109-112) to respondent, and respondent never saw fit to file any counter-designation or to offer any objection to said Appendix. No reference has been made by any party to any portion of the record not contained in the said Appendix which, in fact, includes all of respondent's case and almost the entire record. A transcript of the complete record, duly certified by the Clerk of the United States Court of Appeals for the District of Columbia, has already been filed with the Clerk of this Honorable Court, and if certiorari be granted by this Honorable Court, as prayed by the petitioner, your petitioner will cause to be printed such other or additional parts or all the record as may be necessary, or so much thereof as counsel for the parties hereto may by stipulation designate. Further the original record in the Court of Appeals, by order of that Court, has already been lodged with the clerk of this Court.

For authority for this motion, your petitioner refers to No. 319, this Term, *Fidelity Assurance Association* v. *Sims*, (C. C. A. 4th), certiorari granted and motion to consider the application for certiorari on appendices granted October 12, 1942.

OGDEN H. HAMMOND, JR.,
By WILBER STAMMLER,
Counsel for Petitioner.

DANIEL G. ALBERT,
GEORGE W. DALZELL,
Of Counsel.

(4223)

(14)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 691

OGDEN H. HAMMOND, JR., *Petitioner*,

v.

EDYTHE STERLING HAMMOND, *Respondent*.

BRIEF OF RESPONDENT, EDYTHE STERLING HAMMOND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF RESPONDENT, EDYTHE STERLING HAMMOND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 113-115) is reported in 131 (F. 2d) 351.

SUMMARY OF ARGUMENT.

POINT ONE. The Municipal Court of the District of Columbia did not err in refusing to accept expert testimony as to foreign law.

POINT TWO. The United States Court of Appeals for the District of Columbia did not misapply the law of New York.

POINT THREE. There was no overpayment by petitioner as alleged, and even if true, said alleged overpayment amounted to a mistake of law for which there can be no recovery.

ARGUMENT.

POINT ONE.

The Municipal Court of the District of Columbia did not err in refusing to accept expert testimony as to foreign law.

Petitioner complains that the Trial Court refused to permit expert testimony as to the law of New York. Reference to the trial record shows that Appellant's Counsel acceded at the trial to the Court's suggestion to submit briefs on the law of New York (R. 32). Only with regard to the admissibility of the three self serving "lawyer" letters written by petitioner after the institution of this action (R. 82-88), did petitioner tender Attorney Stammler, petitioner's present attorney, as an expert on New York law (R. 46-48). Inasmuch as the admissibility of evidence is governed by the law of the forum (Restatement of the Law of Conflicts of Laws, Section 597) and not by the law of New York, where the agreement was made, the Trial Court was perfectly correct in refusing to hear "expert" testimony on the law of New York as to the admissibility of these letters.

Even if petitioner had made a proper offer at the trial to prove by "expert" testimony New York law as to the party's substantive rights under the separation agreement, the Trial Court would have been justified in excluding it.

In the first place, petitioner did not plead the New York law in his answer. If, as petitioner's Attorney argues, the New York law is deemed "foreign" law in the Municipal Court of the District of Columbia, and is not judicially noticed, then it must be pleaded if the party seeks to prove it as a fact.

Restatement of the Law of Conflicts, Sec. 621
49 Corpus Juris, p. 153
20 American Jurisprudence, p. 71
1 Chitty, Pleadings, p. 238, note (o).
134 A. L. R. 570, at 571.

Secondly, it was improper and undesirable to offer proof of the law of one of the states in a Court of the United States, since the laws of all the states are the subject of judicial notice by the Courts of the United States.

> *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751; 30 L. Ed. 825.
> *Andrus* v. *People's Bldg. Loan and Savings Ass'n.*, 36 C. C. A. 336, 94 Fed. 575.

This applies to the Courts of the District of Columbia.

> *Moore* v. *Pywell*, 29 App. D. C. 312, 9 L. R. A. (N. S.) 1078.

None of the authorities cited in petitioner's brief sustains his contention that the Municipal Court is not a "court of the United States." In *O'Donoghue* v. *United States*, 289 U. S. 516, cited by petitioner, the Supreme Court was not at all concerned with the lessor courts of the District of Columbia, nor did it mention them. There the issue was merely whether the Supreme Court and this Court are constitutional courts insofar as the Justices were entitled to the protection of Article 3, Section 1, of the Constitution.

In *Hanley* v. *Donoghue*, 116 U. S. 1, referred to by petitioner, the Supreme Court stated on page 5:

> "When exercising an original jurisdiction under the Constitution and laws of the United States, this Court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of the United States * * *." (Italics ours.)

The reason for applying this rule was clearly stated in a recent decision. *Cray, McFawn & Co.* v. *Hagarty, Conroy & Co., Inc., et al.*, 27 F. Supp. 93, affirmed 109 F. (2d) 443. There the court stated at page 95:

> "For the accepted rule almost since the beginning of our federal jurisprudence has been that the law of any state of the Union, whether statutory or the result of judicial decisions, is a matter of which the courts of

> the United States may take judicial notice without plea or proof, because the laws of the several states cannot in courts of the United States be regarded as foreign laws. * * *'' (Italics ours.)

This reasoning is equally applicable to the Municipal Court of the District which is a court of record created by the Congress of the United States (District of Columbia Code of 1940, Sec. 11-702; March 3, 1921, 41 Stat. 1310, ch. 125, Sec. 2).

None of the other cases cited by petitioner in his first point, it is respectfully submitted, support his position. In fact, he has misconstrued his position, for it does not involve a question as to whether or not the Municipal Court of the District of Columbia is an inferior tribunal, but merely a question of whether or not expert testimony as to foreign law should have been taken by the Municipal Court instead of a procedure which has been followed by the courts of the District of Columbia from time immemorial. The United States Court of Appeals for the District of Columbia felt that the question was so devoid of merit and so elementary that, in its opinion it did not even comment on this point raised by the petitioner in his appeal to that court.

POINT TWO.

The United States Court of Appeals for the District of Columbia did not misapply the law of New York.

Petitioner contended that he was not chargeable with arrears of payments due under the agreement because his wife has refused to allow him partial custody of the child in accordance with the agreement. By the law of New York, the custody provision is a material part of the contract, and a breach by the wife without justification will bar recovery by her, *Duryea* v. *Bliven*, 122 New York 567, 25 N. E. 908, but in this case the undisputed facts show that petitioner made no request or demand for custody during the years 1938, 1939 and 1940. It was not until 1941, when the respondent demanded that he pay over the amounts due her under the

agreement or stand suit, that he intimated his desire to have the child spend part of the summer with him at his father's home, and it was not until after this action was brought that he actually made a definite and positive demand. This was too late to alter respondent's rights. The sums in question here were due in the years 1939 and 1940. During those years, there was no breach of the agreement by the wife, and nothing to show that she would not have complied with a demand by the husband. None having been made, the rights of each of the parties under the agreement became fixed and definite upon the filing of suit, and possible defenses acquired subsequently are of no avail. *Mavian* v. *Majestic Photo, Inc.*, 19 N. Y. Supp. (2d) 677, *Dickey* v. *Turner*, 49 F. (2d) 998; *Pearlman* v. *Newburger*, 117 Pa. Super. 328, 178 A. 402.

Moreover, the obligations of the petitioner and respondent under the agreement were mutual and reciprocal. Hence, while petitioner's breach continued, he was in no position to demand performance by respondent. *Rice* v. *Fidelity & D. Co.*, 103 Fed. 427; *Cresswell Ranch &c. Co.* v. *Martindale*, 63 Fed. 84. And this would be true even in a case in which the delinquent party acted in good faith. "The rights and remedies of parties for the breach of civil contracts ought not to be so placed at the mercy of those who break them." *Cresswell* case, *supra.* It would be both incorrect and inequitable to hold that petitioner could refuse to furnish support to his wife and child, as he had bound himself by contract to do, and at the same time insist upon his rights under the Contract to have custody of his child.

None of the cases cited by petitioner in his second point appear to be pertinent to the facts in this case as appear borne out by the record.

POINT THREE.

The beginning of petitioner's third point appears to be nothing but a restatement and attempt to reargue purely questions of fact which were found against him by the lower

court. There was no overpayment by petitioner as alleged, and even if true, said alleged overpayment amounted to a mistake of law, for which there can be no recovery.

Respondent contends that the record conclusively shows that no overpayment was ever made by this petitioner. The separation agreement entered into between the parties provides that petitioner make his payments within ten days after receipt of income, the percentages to be governed by the income of the preceding year with adjustment to be made at the end of the year when the amount actually received had been determined. To this end, he is required to furnish respondent, or her attorney, with a sworn statement of his income on or before the 10th of the following January. The Trial Court ruled that, since this latter provision had not been complied with, evidence of the overpayment could not be introduced. In addition, respondent, when petitioner failed to submit the sworn statement, could only rely on petitioner's word and accept moneys which he sent to her relying upon his statement that these were the proper amounts.

The United States Court of Appeals for the District of Columbia ruled, and properly so, that it was not even necessary to consider these questions for the evidence which petitioner offered on the subject, all of which is found in the record, shows beyond any question that the amount which he claims was overpaid, was so paid because, in computing the amount due under the agreement, he included in his income for the year 1938 capital gains derived from the sale of securities which he now insists should not have been included. But if his position in this be conceded, and it is not, under the New York law which governs this agreement, such an overpayment is not recoverable where it was made, as is the case here, under a mistake of law. Petitioner knew what his income for the year 1938 was, knew what portion of it had been derived from the sale of securities, and knew what portion was payable to his wife. If anything, he misapprehended his legal rights under the contract, and the

New York courts will not grant relief for a mistake of law occurring with full knowledge of the facts. *Payne* v. *Witherbee, Sherman & Co.*, 200 N. Y. 572, 93 N. E. 954; *Adrico Realty Co.* v. *New York*, 250 N. Y. 29, 164 N. E. 732, 64 A. L. R. 1; *Childs* v. *Childs*, 263 App. Div. 946, 34 N. Y. Supp. (2d) 46. Also *Burne* v. *Van Raalte Company, Inc.*, 202 N. Y. App. Div. 189, 195 N. Y. Supp. 601.

It is denied that anything in the record can be taken to show that respondent has secured a double recovery or a prejudgment in any future cases which may be instituted by petitioner's refusal to comply with his agreement.

CONCLUSION.

It is respectfully submitted that no question is herein presented which warrants the granting of a writ of certiorari, and that the well reasoned opinion of the United States Court of Appeals for the District of Columbia shows that the petition for writ of certiorari is completely lacking in merit and should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 691

OGDEN H. HAMMOND, JR., *Petitioner,*

vs.

EDYTHE STERLING HAMMOND, *Respondent.*

REPLY BRIEF FOR PETITIONER.

WILKIE STANDLEE,
Attorney for Petitioner.

DANIEL G. ALBERT,
GEORGE W. DALZELL,
Of Counsel.

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REPLY BRIEF FOR PETITIONER.

Only a few remarks need be made as to respondent's brief. These can best be made in the order of their argument.

Point One—Foreign Law. Respondent's contention that petitioner acceded in the rulings of the Municipal Court on the exclusion of his expert testimony is a direct mis-statement of the record (R. 32, 48, 54). Petitioner's answer (R. 10-15) makes explicit reference to the whole separation agreement entered into "in the city of New York" (R. 10) and pleads a general denial (R. 13—"not indebted to plaintiff") together with two affirmative defenses, breach of custody and of delivery of the furniture. On this record it is clear that petitioner as defendant sufficiently pleaded the law of New York because it is well settled that the particular rule of pleading as to foreign law invoked by respondent "does not apply where any defense may be shown under a

general denial". *1 Bancroft's Code Pleading (1926 ed.), p. 147; Berggren* v. *Johnson,* 105 Kan. 501, 185 Pac. 291.

Respondent's authorities at p. 2 of her brief do not sustain her position. The reference to 134 A. L. R. 570, at 571 seems ill-timed in view of the flat statement at the beginning of the Annotation that "The question as to the necessity of pleading foreign law is not within the scope of this discussion" (134 A. L. R. at 570). The remainder of respondent's pleading authorities deal with the pleading of a foreign statute, a question not involved here, and not with the pleading of foreign common law which is here involved.

Furthermore this objection of respondent comes too late. It was never made in any form in the Municipal Court and was never heard until briefs were filed in the Court of Appeals. That is too late under all the authorities and constitutes waiver of technical pleading defects as a matter of law. See *Cole* v. *Ralph,* 252 U. S. 286, 290 in direct point here. "The omission to plead a foreign statute may be waived" *(1 Bancroft's Code Pleading, ap. cit. supra,* at p. 147). Respondent's own authorities, *Corpus Juris* and *American Jurisprudence,* carry this rule and a full discussion of it, 49 C. J. 830 *et seq.;* 41 Am. Juris, 565. "An amendable defect or omission in a pleading is waived, unless an objection in some appropriate form is taken in time for the amendment to be made" (49 C. J. 830). Here no objection was made by respondent before, at, or after trial when the pleading amendment could easily have been made by petitioner—her objection in the appellate courts only comes too late, *Cole* v. *Ralph, supra.*

Respondent's argument (her brief, pp. 3-4) that the Municipal Court of the District of Columbia is a court of the United States has already been answered in our brief in support of the petition at pp. 18-22 thereof. Her statement (her brief, p. 3) that in *O'Donoghue* v. *United States,* 289

U. S. 516 "the issue was merely whether the Supreme Court and *this Court* are constitutional courts insofar as the justices were entitled to the protection of Article 3, Section 1, of the Constitution" is of course inaccurate because this Court in that decision was concerned not with its own status ("this Court") but only with the status of the District of Columbia courts. If the procedure in the instant case has been followed by the Municipal Court and other inferior tribunals of the District of Columbia "from time immemorial" as respondent avers (her brief, p. 4), then it is indeed time for this Court on certiorari to declare the patent illegality of their procedure.

Point Two—Misapplication of the law of New York. Here respondent contents herself by way of argument by making a *verbatim* quotation without quotation marks and with only name changes (*i.e.*, appellant and appellee to petitioner and respondent) of the opinion of the Court of Appeals (R. 113-115). The opinion of that Court has already been fully discussed by us in our petition for rehearing (see R. 122-126) and in our brief in support of the petition (pp. 23-30; Appendix, pp. 34-41). No good purpose would be served by a repetition of our argument here.

It is to be emphasized, however, that nowhere does respondent challenge the plain misapplication of the law of New York by the Court of Appeals. Respondent does not dispute that *Haskell* v. *Haskell* (Appendix to our brief in support of the petition, pp. 34-41) is exactly in point and controlling here. Yet the Court of Appeals in the instant case has reached a determination directly contrary to that of the Court of Appeals of New York in the *Haskell* case. We say that this flagrant refusal to follow the law of New York which must here be applied under rules already laid down by this Court calls for the issuance of a writ of certiorari by this Court to correct the errors of the Court of Appeals.

Point Three—Respondent's double recovery. Here respondent does not see fit to favor us with any record reference but makes instead the most sweeping mis-statements of fact without support in the record. We rest on our full discussion in our petition for rehearing in the Court of Appeals (R. 119-121; 131-136) and in our brief in support of the petition (pp. 30-33), and will not here again repeat our argument there made. The last portion of respondent's argument (her brief, pp. 6-7) is again a *verbatim* quotation without quotation marks from the opinion of the Court of Appeals (R. 114). This argument has already been fully considered by us (R. 119-121; our main brief, p. 32) and it is clear that this case is concerned with *mistake of fact*, not *mistake of law*, so far as petitioner's 1938 overpayment was concerned. See R. 54-55, 99, Item VIII.

Conclusion.

WHEREFORE, we respectfully pray that the petition for a writ of certiorari herein be granted.

Respectfully submitted,

WILBER STAMMLER,
Attorney for Petitioner.

DANIEL G. ALBERT,
GEORGE W. DALZELL,
Of Counsel.